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KIMBERLY-CLARK WORLDWIDE, INC. 401 NORTH LAKE STREET NEENAH, WI 54956			VO. HAI	
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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Paper No. 110703

Application Number: 09/374,117
Filing Date: August 16, 1999
Appellant(s): FORTE, NICHOLAS F.

William D. Herrick
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed 09/09/2003.

A statement identifying the real party in interest is contained in the brief.

(1) *Real Party in Interest*

A statement identifying the real party in interest is contained in the brief.

(2) *Related Appeals and Interferences*

A statement identifying the related appeals and interferences which will directly affect or be directly affected by or have a bearing on the decision in the pending appeal is contained in the brief.

(3) *Status of Claims*

The statement of the status of the claims contained in the brief is correct.

(4) *Status of Amendments After Final*

No amendment after final has been filed.

(5) *Summary of Invention*

The summary of invention contained in the brief is deficient because Appellant's brief does not include the pages and lines from which the summary is described in Appellant's specification.

(6) *Issues*

The appellant's statement of the issues in the brief is correct.

(7) *Grouping of Claims*

Appellant's brief includes a statement that claims 26-29 and 32 stand or fall together.

(8) *Claims Appealed*

The copy of the appealed claims contained in the Appendix to the brief is correct.

(9) *Prior Art of Record*

6,075,179	McCormack et al	06-2000
5,011,698	Antoon, Jr. et al	04-1991

(10) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claims 26-29 and 32 are rejected under 35 U.S.C. 102(e) as being anticipated by McCormack et al (US 6,075,179). McCormack is directed to breathable, multi-layer films for use in personal care absorbent articles such as diapers, sanitary napkins, bandages, etc. (column 2, lines 46-53). The core layer of McCormack is comprised of polyolefins (column 3, lines 42-47) and particulate fillers with average particle sizes in the range of about 0.1 to about 7 microns (column 4, lines 2-3). McCormack teaches that if sufficient filler is used in combination with sufficient stretching of the film, voids can be created around the particles contained within the core layer thereby making the core layer breathable and moisture vapor permeable (column 4, lines 3-12). Additionally, the core layer acts to adhere two skin layers together to form an overall liquid impermeable composite (column 13, lines 23-30). The skin layers of McCormack are comprised of sheets of hydrophilic polymeric material such as ethylene vinyl acetate, polyesters, polyamides and ethylene vinyl alcohol (column 4, lines 19-32), which are disclosed as suitable hydrophilic polymeric materials in Appellant's specification at page 14, lines 13-29. The skin layer is not necessarily required to include particulate fillers (column 2, lines 30-33). Likewise, the skin layer is substantially free of particulate filler. Further, the skin layer is water vapor permeable and

antimicrobial (column 4, lines 15-19). The three films of McCormack are coextruded so that the outer skins are bonded to the core in a complete and uniform manner. Because the skin layers of McCormack are antimicrobial, this reads on a barrier to microorganisms. The laminate is used in diapers, feminine hygiene products and bandages as the liquid impermeable absorbent core (column 7, lines 26-45). This reads on a barrier to blood and bodily fluids.

McCormack teaches the claimed breathable film but does not specifically state that the core layer is microporous having a porosity in the range of 27.6% to 42%. However, it appears that the core layer of McCormack and Appellant are made of the same resin, i.e. polyolefin (McCormack, column 3, line 13 vs. Appellant's specification, page 11, line 12) and particulate fillers with average particle sizes in the same range. Both are stretched to create voids around the filler particles, and both bond together two outer hydrophilic polymeric resin layers of the same composition. Thus, it is believed that the core layer of McCormack is inherently microporous having the porosity within the claimed range. Additionally, even though McCormack does not specifically disclose that the core layer is microporous having a porosity in the range of 27.6% to 42%. Antoon, Jr. evidences that stretching a polyolefin film containing filler with particle sizes ranging from 10 to 25 microns results in a microporous breathable film having a porosity of at least 30% which is for use in feminine care products and diapers.

McCormack discloses a multiplayer film wherein each of the skin layers comprises 2 percent of the overall film thickness and the core layer comprises 96 percent of the overall film thickness (example 2). McCormack also discloses the ability

to reduce cost by relegating the most costly ingredients to the outer layers which represent the smallest proportion of the overall multi-layer film. However, McCormack does not specifically disclose percent by volume values for the core and skin layers. It appears that the multi-layer film of McCormack is substantially identical to the presently claimed multi-layer film because both are comprised of substantially the same materials and produced by using the same process. McCormack and Appellant disclose a coextruded multi-layer film comprised of a core layer of polyolefin and calcium carbonate filler and skin layers of polyester or polyamide or ethylene vinyl alcohol or ethylene vinyl acetate. It is believed that the multi-layer film of McCormack would inherently possess percent by volume values within Appellant's presently claimed ranges.

(11) Response to Argument

Appellant argues that the skin layer of McCormack is made more adhesive. The arguments are not commensurate in scope with the claims because the claims do not require the skin layer is adhesive free. Further, the arguments that there is no teaching McCormack of use of an adhesive core are not found persuasive for the following reasons. The core layer of McCormack is coextruded with a first skin and a second skin so that the first skin is attached to a first exterior surface of the core layer and the second skin layer is attached to the a second exterior surface of the core layer. Since the first and second skin layers are "attached" to the core layer, the core layer of McCormack expressly reads on Appellant's "adhesive core layer". Additionally, the core layer of McCormack and Appellant are comprised of the same resin, i.e. polyolefin

(McCormack, column 3, line 13 vs. Appellant's specification, page 11, line 12) and particulate fillers with average particle sizes in the same range. Both are stretched to create voids around the filler particles, and both bond together two outer hydrophilic polymeric resin layers of the same composition. Therefore, it is not seen that the core layer of McCormack would have performed differently from Appellant's core layer. This is in line with *In re Spada*, 15 USPQ 2d 1655 (1990) which holds that products of identical chemical composition can not have mutually exclusive properties. Appellant argues that there is no teaching or suggestion in McCormack of the void content of the core. The examiner respectfully wishes to point out that the language of the claims does not require the microporous film to be stretched in order to form the voids with a porosity in the range from about 27.6% to about 43%. Since the microporous film is not stretched as required by the claims, the porosity range is thus not necessarily present in the claims. Further, it appears that the core layer of McCormack and Appellant are made of the same resin, i.e. polyolefin (McCormack, column 3, line 13 vs. Appellant's specification, page 11, line 12) and particulate fillers with average particle sizes in the same range. Both are stretched to create voids around the filler particles, and both bond together two outer hydrophilic polymeric resin layers of the same composition. Thus, it is believed that the core layer of McCormack is inherently microporous having the porosity within the claimed range. Additionally, even though McCormack does not specifically disclose that the core layer is microporous having a porosity in the range of 27.6% to 42%. Antoon, Jr. evidences that stretching a polyolefin film containing filler with particle sizes ranging from 10 to 25 microns results in a microporous breathable

film having a porosity of at least 30% which is for use in feminine care products and diapers. Since Appellant did not contest the porosity disclosed in Antoon, Jr., the examiner assumed that Appellant agreed the core layer of McCormack would have the porosity within the claimed range.

Appellant argues that as polyolefin resins of widely varying properties are available and the properties of the composition are a function of the composition as a whole, the presence of the polyolefin resin in the core layer does not necessarily render the core layer of McCormack substantially identical to Appellant's core layer. The arguments are not found persuasive. In the first place, the arguments are not commensurate in scope with the claims because nothing specific about the composition of the core layer has been included in the claims. Secondly, the core layer of McCormack is comprised of polyolefin (column 3, line 13) which is disclosed as a suitable polymeric material in Appellant's specification at page 11, line 12.

The examiner maintains that the same token is applied to the percent volume ratios. McCormack discloses a multiplayer film wherein each of the skin layers comprises 2 percent of the overall film thickness and the core layer comprises 96 percent of the overall film thickness (example 2). McCormack also discloses the ability to reduce cost by relegating the most costly ingredients to the outer layers which represent the smallest proportion of the overall multi-layer film. It appears that the multi-layer film of McCormack is substantially identical to the presently claimed multi-layer film because both are comprised of substantially the same materials and produced by using the same process. McCormack and Appellant disclose a coextruded multi-layer

film comprised of a core layer of polyolefin and calcium carbonate filler and skin layers of polyester or polyamide or ethylene vinyl alcohol or ethylene vinyl acetate. It is believed that the multi-layer film of McCormack would inherently possess percent by volume values within Appellant's presently claimed ranges.

Appellant argues that the combination of EMA and cattaloy would reduce the high barrier needed for blocking microorganisms of the skin layers. The arguments are not found persuasive. McCormack teaches the skin layer being water vapor permeable and antimicrobial (column 4, lines 15-19). Further, the claims are not specific about how high the barrier will be in term of degree of blocking microorganisms. Accordingly, this reads on a barrier to microorganisms. For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

Hai Vo
November 8, 2003

Conferees

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